

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL AVERY,

Defendant-Appellant.

UNPUBLISHED

March 6, 2007

No. 265369

Genesee Circuit Court

LC No. 05-016154-FH

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of fleeing and eluding a police officer, third degree, MCL 750.479a(3), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the jury was persuaded by a comment by the trial court in the jury's presence that defendant should stop testifying about drug and alcohol use to evoke sympathy. We disagree.

Defendant did not object to this comment; therefore, this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We will not reverse a conviction based on an unpreserved issue except for plain error that affected a defendant's substantial rights by resulting in the conviction of an actually innocent person or seriously affecting the integrity, fairness, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999).

In *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), we examined allegations of misconduct by a trial judge in a criminal trial, and held as follows:

[A] trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [Citations and internal quote marks omitted.]

To determine the effect of such comments, the entire record should be considered. *Id.* at 697-698. Viewing the record as a whole, we find that the trial court's brief and isolated comment did not unduly influence the jury or deprive defendant of a fair trial. Immediately after the court made the statement, defendant made an offer of proof, and the trial court thereafter stated in the jury's presence that defendant could discuss his use of alcohol. Subsequently, the trial court instructed the jury at length that its comments were not evidence but merely irrelevant opinions that the jury should ignore. Because "jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), defendant has not demonstrated that a plain error occurred that affected his substantial rights. *Jones, supra*.¹

The trial court made the comment about sympathy after defendant continued to talk about drug use notwithstanding the ruling that intoxication was irrelevant. Defendant also did not fully explain his purpose for presenting the intoxication evidence until after the trial court made the comment about sympathy. Defendant had previously argued only that the intoxication evidence was "relevant to where [defendant] was and what he was doing." Once defendant explained in the offer of proof following the comment that the intoxication evidence was relevant to the allegation that he passed out and could not have been driving, the trial court ruled that he could discuss his use of alcohol. Therefore, had defendant adequately explained his theory or complied with the court's ruling, the comment would likely never have been made. Assuming the trial court erred, such error would not require reversal "[b]ecause error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence" *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).²

Defendant next argues that the trial court should have granted a mistrial because plaintiff failed to disclose a booking photo of defendant in a white t-shirt even though he had requested all evidence pertaining to the case. More specifically, defendant argues that plaintiff violated his discovery request when it disclosed a booking photo on the second day of trial from the city police of defendant in a white t-shirt. An officer testified that defendant was wearing a white t-shirt when he was arrested.

"The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion." *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996) (citation omitted). For an abuse of discretion to occur, the trial court's denial of a motion for mistrial must be so grossly erroneous that it prejudices the defendant's rights, impairs

¹ Defendant also argues, "The trial court must make it clear that his comments express only his personal opinion and are not binding upon the jury. He should preface such comments with the statement that the jury is free to disregard them." Because the trial court instructed the jury in this manner, defendant's argument in this regard is without merit.

² Cf. *People v Esse*, 8 Mich App 362, 366; 154 NW2d 545 (1967) (holding that defendant was not deprived of a fair trial when the trial court told him to "shut up" after he interrupted his own attorney. The court reasoned that although "the court may have spoken more sharply than was necessary, . . . [t]he court's conduct and remark . . . was not prejudicial error, in the light of the circumstances under which it was made [because] the defendant's own conduct invited the reprimand.")

his ability to get a fair trial, and amounts to a miscarriage of justice. *Id.*; see also *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

We find that defendant has abandoned this issue by failing to properly brief it and explain his theory. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (citations omitted). The argument section of defendant’s appellate brief that is devoted to this issue neither explains how the cited authority applies to this case, nor argues that the alleged discovery violation affected the outcome of the case. Defendant also cites no authority by which we could determine whether plaintiff violated a discovery rule. We need not search for authority to support a party’s position or argument. *Id.*

In any event, we conclude that plaintiff did not violate the discovery order because the t-shirt photo was not “evidence that the party may introduce at trial.” MCR 6.201(A)(6). As the trial court pointed out, the t-shirt photo did not become relevant until defendant disclosed on the second day of trial that he would introduce a photo of himself in a dark jersey taken at the county jail.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder